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U.S. Education Law: Is the Right to Education in the U.S. in compliance  
with International Human Rights Standards?

By  
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Submitted in partial fulfillment of the requirements of the  
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Michigan State University College of Law  
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Professor Susan Bitensky  
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## **I. Introduction**

“One of the great paradoxes of the progress of human rights thinking is that many prominent governments. . . basically believe that human rights are only relevant for other countries.”<sup>1</sup> The United States is no exception. It is undisputed that the United States is the wealthiest country in the world. This fact would lead any rational person to believe that even the most basic human rights would be afforded to the citizens of such a wealthy country. However, for those who live in the United States, it is obvious to see that many basic human rights are lacking, including the right to education. The right to education has been an area of law in which the United States has been a consistent underachiever.

In the United States, there is no explicitly enumerated positive fundamental federal constitutional right to education. Due to this deficiency in the Constitution, state governments have been in control of the right to education under the guidance of the Tenth Amendment.<sup>2</sup> State and local authorities have had the responsibility to determine the amount of education and right to that education for the citizenry. However, sometimes the federal government finds itself encroaching on the power the Constitution has delegated to the states, and changing the tide.

To add to this confusion, the international community has set standards by promulgating several conventions regarding the right to education. These conventions have granted the citizens of State parties an affirmative, or positive, right to education. Since the United States is not a party to any of the conventions that will be addressed in this article, many countries are left wondering why. U.S. citizens are left wondering why the government is so reluctant on binding itself to providing an affirmative right to education. It has also left citizens wondering what would it take for the U.S. to be in compliance with the international community’s ideals of a positive right to education.

Section 1 of this paper will explore the current status of U.S. education law concerning the right to education. It will look at the right to education the federal government bestows on its citizenry through Supreme Court decisions and statutory entitlements. Following a look into the federal provisions, the article will assess the status of state constitutional and statutory rights of education.

In section 2, the focus will shift to the international community. The relevant conventions dealing with the issue of a right to education will be examined and analyzed to illustrate current international law and the right to education afforded to State parties. In addition, the customary interpretation and implementation of these conventions will be explored. This article will study the legal ramifications of these conventions, specifically in terms of obligations imparted on State parties and on the U.S.

The final section of this paper will explore whether the United States is in compliance with international legal standards. It will examine the tough questions regarding obligations that would arise under the current international conventions for U.S. lawmakers. It will explore the possible steps the United States will have to take to bring its educational efforts up to par with the ideals of the international community. This paper will not attempt to address the issue of quality of education or the issue of what quantum of education is acceptable. In addition, this paper is not a comparison of U.S. law and the law of another specific nation but rather a comparison of U.S. law with the ideals of the international community, regardless if any one country actually achieves the convention mandates.

## **I. U.S. Education Law**

U.S. education law has developed under both the federal system and the state systems.

The U.S. Constitution does not explicitly enumerate a positive fundamental right to

education.<sup>3</sup> However, it has long been debated whether the U.S. Constitution implicitly enumerates a positive fundamental right to education.<sup>4</sup> Therefore, the Supreme Court and federal and state legislatures have been the catalysts through which the right to education has been developed.

In federal constitutional law, there exist two types of rights. Here we will look at these types within the framework of education. One is a negative right to education, which was recognized in *Meyer v. Nebraska*, 262 U.S. 390 (1923). A negative right to education is the right to have the government not interfere with your attempt to acquire learning.<sup>5</sup> The other is called a positive right to education which is something that the Supreme Court has never recognized in the context of education. A positive right would be an affirmative right that the government must provide a certain quantum or quality of education.<sup>6</sup> In essence, the government would guarantee the citizenry a certain level of education that it must provide.<sup>7</sup> In addition to positive and negative rights, federal constitutional rights can be seen as fundamental or non-fundamental rights. This issue of fundamental and non-fundamental will be addressed in the below subsection.

#### *a. Supreme Court Decisions*

First, let us explore this constitutional right to education, positive or negative, from the Supreme Court's perspective. As mentioned earlier, *Meyer v. Nebraska*, was the earliest case in which the Supreme Court addressed this right.<sup>8</sup> In this case, a state law that prohibited the teaching of a foreign language before completion of the eighth grade was struck down.<sup>9</sup> The action was brought as a violation of the Fourteenth Amendment's Due Process Clause.<sup>10</sup> The court decided that the statute violated the Due Process Clause because it disregarded pertinent fundamental rights guaranteed by the clause, including the right to acquire useful

knowledge.<sup>11</sup> A fundamental right is one that is implicitly or explicitly found within the language of the Constitution or disadvantages a particular suspect class while everything not regarded as fundamental is found to be non-fundamental like the current right to education.<sup>12</sup> Even though the court did not address the question of a fundamental positive right to education, it did express the first federal negative right to education by stating that the state did not have the right to interfere with the right to acquire knowledge.<sup>13</sup>

Several years following the *Meyer* decision, the court again addressed this negative right to education in *Pierce v. Society of Sisters*.<sup>14</sup> Under the same theory as in *Meyer*, several private school operators sought injunctive relief against an Oregon compulsory school attendance law that required public school attendance of children between the ages of eight and sixteen.<sup>15</sup> The court in this case again reaffirmed the negative right to education developed in *Meyer* when the court decided that this statute violated the substantive due process right of not interfering with the right to acquire knowledge.<sup>16</sup> The court recognized an affirmative, or positive, fundamental right of a parent to rear the education of their child.<sup>17</sup> However, again, the question of a fundamental positive right to education went unanswered.

In *Brown v. Board of Education*, a unanimous court decided that *de jure* racial segregation in public elementary and secondary schools is violative of the Constitution's Equal Protection Clause.<sup>18</sup> Although the court addressed the question of racial segregation and not the issue of a right to education, the court did take the opportunity to indirectly support a positive fundamental right of education in its dicta.<sup>19</sup> In its opinion, the court stated, "Education is perhaps the most important function of state and local governments. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has

undertaken to provide it, is a right which must be made available to all on equal terms.”<sup>20</sup> By doing so, the court affirmed the principle that education is essential to an effective democratic society.<sup>21</sup> Even though dicta is not binding on the judiciary, it is good evidence of the importance the court places on education and stresses the importance of the educational opportunity.<sup>22</sup> Furthermore, it assures Supreme Court support in upholding the right to education in situations in which the state has positively guaranteed it.

Following *Brown*’s promising language, however, was the case of *San Antonio Independent School District v. Rodriguez*, where the court did weigh in its opinion as to whether some quantum of education should be a positive fundamental right in the United States or remain a non-fundamental right. A constitutional challenge was brought on behalf of Mexican-American schoolchildren under the Equal Protection Clause of the Fourteenth Amendment against a Texas system of financing public education through local property taxes.<sup>23</sup> The statute provided for state funded educational systems that caused low property tax base districts to receive fewer funds than high property tax base districts.<sup>24</sup> Plaintiffs urged that the statute be struck down under strict scrutiny analysis, which is the most stringent review that can be carried out by the Supreme Court.<sup>25</sup> However, to receive this level of review, it is necessary that a fundamental right is impinged or a suspect class is adversely affected.<sup>26</sup>

The court refused to recognize a positive fundamental right to education claiming that there was not a total deprivation of a right to education.<sup>27</sup> It stated that not only did the Constitution fail to explicitly guarantee any right to education but it did not implicitly guarantee this right either when the plaintiffs tried to argue that for meaningful exercise of the free speech and right to vote clauses, a right of education needed to be provided.<sup>28</sup> In

response, the court denied this argument stating, “we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech or the most informed electoral choice.”<sup>29</sup> The court made it clear that education is important to society but this importance does not alone support an implicit finding of a positive fundamental right to education in the Constitution.<sup>30</sup> Although the court did not believe this funding scheme violated the federal Constitution, in its dicta, the court did allude to the possibility that to protect other rights such as free speech under the Constitution there might be some quantum of education that needs protection.<sup>31</sup> However, the court was not faced with this decision in *Rodriguez* because the plaintiffs were not denied all access to education just that of equal education.<sup>32</sup>

After *Rodriguez*, a positive fundamental right to education appeared lost. Then, in 1982, the court decided *Plyler v. Doe*. This decision has left the constitutional positive fundamental right to education debate perplexing. A violation of the Equal Protection Clause was brought when children of Mexican decent were denied all educational opportunity in Texas.<sup>33</sup> The court reaffirmed the *Rodriguez* holding that the right to education is not a fundamental positive right under the Constitution but on the basis of the alien status of the plaintiffs, the statute was struck down as violative of the Equal Protection Clause.<sup>34</sup> Although the court determined this case using intermediate scrutiny based on the suspect class involved, the court appeared to support the idea that the right to education required a more stringent level of review than rational basis, which is the lowest level of review, but not to the level of strict scrutiny.<sup>35</sup> To come to this conclusion, the court stated, “public education is not a right granted to individuals by the Constitution. . . neither is it merely some governmental benefit indistinguishable from other forms of social welfare legislation.”<sup>36</sup>



This would require the court to examine cases involving the right to education with a higher level of scrutiny than rational basis, intermediate scrutiny, and strike down more pervasive statutes.<sup>37</sup>

As a result of the *Plyler* decision, the question of a fundamental positive right to education remained unresolved. *Papasan v. Allain* was seen as the court's opportunity to bring resolution to this question.<sup>38</sup> In this case, the court upheld a Mississippi statute that distributed educational land trust funds disproportionately so as to deny plaintiffs with minimally adequate education.<sup>39</sup> Plaintiffs, though, did not provide any factual basis that they were denied minimal education and therefore, the court declined the opportunity to address the issue of a fundamental positive right to education.<sup>40</sup>

Even though the Supreme Court has not recognized a positive fundamental right to education at this point, the debate has not ended. As seen in *Papasan v. Allain*, the court confirmed that the question as to whether the right to education is a positive fundamental right remains open.<sup>41</sup> Therefore, the court could still be persuaded to implicitly find this fundamental right in the Constitution. Various other pieces of evidence could provide a persuasive basis for the Supreme Court to recognize a fundamental positive right to education.

As announced in the case of *Michael H v. Gerald D.*, another possible way of recognizing a fundamental substantive due process right, such as education, can be through the use of history and tradition regarding that interest.<sup>42</sup> In *Michael H.*, the court refused to recognize a putative father's interest in his birth child partially based on the historical and traditional evidence of denying this interest.<sup>43</sup> At the time of the birth child's conception, the mother was married to another man and this other man is therefore presumed to be the father of the

child in the state of California.<sup>44</sup> The court made it apparent that not only does the right need be fundamental but “the Due Process Clause affords only those protections ‘so rooted in the traditions and conscience of our people as to be ranked as fundamental.’”<sup>45</sup> Michael H.’s interest as biological father did not outweigh the sanctity of the marital family in the court’s mind and he was denied his interest under the Due Process Clause.<sup>46</sup> If this same approach is taken with the right to education, as shown above, there is a deep societal interest in the value of education and the necessity of education.<sup>47</sup> A case could be made on behalf of a fundamental positive right to education using the dicta of the many Supreme Court decisions and the emerging statutory provisions to find this right under the Due Process Clause of the Constitution.<sup>48</sup> The use of tradition and history in *Michael H.* adds an additional source of evidence for the court to use when it examines the right to education. It also gives the claimants another possible argument to win the debate on a fundamental positive right to education.

*b. Federal Statutory Grants of the Right to Education*

In 1975, Congress enacted the Education for All Handicapped Children Act which has been revised and renamed the Individuals with Disabilities Education Act (IDEA).<sup>49</sup> This act creates a federal positive fundamental right to education for those who are disabled.<sup>50</sup> As long as the child fits the criteria under the act, the child is guaranteed a “free appropriate education in the least restrictive environment.”<sup>51</sup> To be eligible under this act, three things are required: 1) the child must be between the age of three and twenty-one; 2) the child must have a specifically identified disability; and 3) the child must also be in need of special education and its related services.<sup>52</sup> Although the act is vague in describing what “appropriate education” means, it appears necessary that some educational benefit must

materialize.<sup>53</sup> Nonetheless, the IDEA provides a positive right to education by the federal government for a certain class of citizens.

Then, in 2002, Congress enacted the No Child Left Behind Act (NCLB).<sup>54</sup> This act was designed to improve student achievement with various far-ranging provisions. The more vital of these provisions purport that states must take steps to improve academic achievement among the economically disadvantaged if the states are to receive federal funds, highly qualified teachers must be trained and recruited, improved English proficiency must be provided to students that have English as a second language, schools shall become more accountable for academic achievement, research based teaching methods that have been proven effective must be used, and parents shall be afforded better school choice especially if the local schools are inadequate.<sup>55</sup> “The [intended] purpose of [NCLB] is to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments.”<sup>56</sup> The NCLB is seen as a federal attempt to improve educational equity and reduce the necessity to bring constitutional claims or educational malpractice suits.<sup>57</sup> At the very least, this over 1,100 page document could be seen as evidence of a federal statement of a positive fundamental right to education.<sup>58</sup> Its provisions appear to express willingness by the federal government to undertake an obligation to provide some guaranteed right to education and federal supervision and accountability of that right if the states do not abide or follow the mandates of the act. This idea might not have been the intention of Congress but it provides a good resource, along with tradition of the importance of education, other statutes, and prior decisions, in helping along the idea of a positive fundamental right to education under the Due Process Clause of the Constitution.

### *c. State Schemes*

Despite the reluctance of the Supreme Court to recognize a positive fundamental right to education, the purview of the Tenth Amendment has entrusted the right to education in the U.S. to the states. “With regard to education, states not only control access to education but also have the responsibility to provide every child with a free, appropriate education.”<sup>59</sup> “Most state constitutions do put an affirmative duty on the state to provide education.”<sup>60</sup> Not all state courts have recognized the right to education as fundamental but each state has recognized the importance to the citizenry of education.<sup>61</sup> For example, some states use strict scrutiny to determine if the right to education in that particular state is being impeded while others view the right as substantial and use an intermediate scrutiny test to determine if the right to education is being impeded.<sup>62</sup> Both of these levels of scrutiny, as mentioned earlier, are more stringent and provide more protection to the right to education than that provided by the Supreme Court’s use of rational basis, or the lowest level of scrutiny, to examine the right to education.<sup>63</sup> Therefore, under state law, citizens are provided a higher obligation to be afforded the right to education and in some states, guaranteed the positive right to education.<sup>64</sup> In addition, the Supreme Court, in *Plyler*, recognized that if a state undertakes the obligation to provide free public education, it cannot rationally deny a child from receiving it.<sup>65</sup> Based on the state constitutions and state courts, the fundamental right to education would appear to be more welcome by them than by the Supreme Court.<sup>66</sup> “All fifty states guarantee their citizens the right to a public education.”<sup>67</sup>

Furthermore, all states have passed laws requiring children to attend school.<sup>68</sup> These compulsory attendance laws began in Massachusetts in 1852 until all states had passed these

laws in the early 1900's.<sup>69</sup> Compulsory education laws are added evidence that states are committed to advancing education and look positively on its advancement.

Currently, the federal courts do not recognize the positive right to education for its citizens. However, it is clear that the federal government and courts place high importance on education in the U.S. and recent emerging statutes like NCLB provide evidence which could push the U.S. towards recognizing a federal fundamental positive right to education. As for now, most citizens will have to depend on the state constitutional and statutory grants to gain access to education.

## **II. International Human Rights Law**

The international community has valued the need for education for decades. The community has actively worked towards achieving uniform educational standards, regarding the right to education, since the inception of the United Nations. Various conventions have been drafted and implemented world wide that incorporate these ideals. The two most important international conventions that address the right to education will be the focus of this paper: the Convention on the Rights of Child and the International Covenant on Economic, Social, & Cultural Rights. The United States has not ratified either one of these conventions but the United States has signed both of these conventions, classifying it as merely a signatory.<sup>70</sup>

### *a. How does a country become bound to an international convention?*

Before we examine the standards set forth in these conventions, it is imperative that a brief explanation of how a country becomes bound to an international convention is undertaken. In 1969, the Vienna Convention on the Law of Treaties (Vienna Convention)

was created.<sup>71</sup> This convention sets forth the procedure to bind a country to an international convention.<sup>72</sup>

Under Article 11 of the Vienna Convention, a state can become bound by a treaty by either expressing by signature, exchanging of instruments, ratification, acceptance, approval or accession, or by any other means so agreed.<sup>73</sup> In Article 12, it states that a party may be bound by signature but only if the treaty provides that the signature will have such an effect.<sup>74</sup> In this instance, both conventions mentioned above, require consent to be in the form of ratification before the country will become bound by its terms.<sup>75</sup> Ratification would automatically make the signatory a party and bind it to the convention.<sup>76</sup> As the U.S. has not ratified either convention, it is not bound by its terms nor is it a party. In essence, the U.S. has no obligation to fulfill the provisions expounded in its mandate. Nevertheless, under Article 18 of the Vienna Convention, the United States must “refrain from acts which would defeat the object and purpose of a treaty when it has signed the treaty. . .”<sup>77</sup> With the inclusion of this article in the Vienna Convention it appears that the U.S. may have obligated itself to some quantum of education when it signed both conventions. Problematic, however, is the fact that the United States has never ratified the Vienna Convention and is technically not bound by its terms. Despite this fact, the articles under the Vienna Convention have been practiced and followed even without its ratification in the U.S. and world-wide. Generally, the Vienna Convention reflects binding customary international law.<sup>78</sup> According to the U.S. Restatement on Foreign Relations, customary international law is a source of interpretation of the obligations the U.S. assumes as a member of the international community.<sup>79</sup> Since the Vienna Convention has attained the status of customary international law, U.S. lawmakers and courts will use the Vienna Convention to determine the U.S.’s obligations under these

conventions.<sup>80</sup> Therefore, it appears the U.S. bound itself to the terms of the Vienna Convention without official ratification of its terms.<sup>81</sup>

b. *A Look to the Conventions*

Even though the United States is not technically bound by the terms of the conventions, to understand why the U.S. has not ratified these treaties and what obligations might arise if it did so, it is crucial to look at the relevant provisions of these conventions in some depth. In addition, it would be beneficial to lay out a brief history of how these two conventions arose.

In 1948, the United Nations General Assembly passed a resolution that became known as the Universal Declaration of Human Rights.<sup>82</sup> In Article 26 of this resolution, it stated, “Everyone has a right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.”<sup>83</sup> This resolution was not a treaty but merely aspirations declared by the international community as important. “It was not intended to impose legal obligations on States, but rather to establish goals for States to work towards.”<sup>84</sup> This Declaration has been reaffirmed not only by the United Nations on several occasions but has inspired numerous constitutions world-wide. Additionally, some of its articles have been codified by treaty, as will be seen in the subsequent conventions.<sup>85</sup> Furthermore, “its constant and widespread recognition means that the principles it contains can now be regarded as part of customary law.”<sup>86</sup>

*Convention on the Rights of the Child (Children’s Convention)*

In 1990, the Convention on the Rights of the Child was put into force.<sup>87</sup> This is the most universally ratified treaty in the world with only the United States and Somalia not

ratifying.<sup>88</sup> The convention undertakes the obligation to provide the children of the world a uniform and common respect for their basic human rights.<sup>89</sup> Included in this list of obligations to the child is the positive right to education.<sup>90</sup>

Under Article 28, the convention requires that “States parties recognize the right of the child to education.”<sup>91</sup> Moreover the article lays out various measures that each party must achieve by progressive means and on the basis of equal opportunity.<sup>92</sup> The provision includes making primary education compulsory and available free to all, encouraging the development of different forms of secondary education, making higher education accessible to all, making educational and vocational information and guidance available, and taking measures to encourage regular attendance at schools and reduction of drop-out rates.<sup>93</sup> With all of these affirmative obligations, the right to education under the Children’s Convention is a positive right.<sup>94</sup>

With such lofty and ambiguous obligations, parties are not always sure what steps need to be taken and how quickly. The Convention attempts to provide an answer to these questions. Article 4 states, “States parties shall undertake all appropriate legislation, administrative, and other measures for the implementation of the rights recognized in the present Convention.”<sup>95</sup> Economic and social rights, which the positive right to education is one, shall be realized to the “maximum extent of their available resources.”<sup>96</sup>

Even with these guidelines of what needs to be done and when it needs to be done, parties are still unsure of what obligations must be fulfilled. This is one of the reasons the United Nations has set up a monitoring committee to provide answers to State parties. “The Committee on the Rights of the Child (CRC) is the body of independent experts that monitors implementation of the Convention on the Rights of the Child by its State parties.”<sup>97</sup>



Parties are compelled to submit various reports to the committee about what they are doing to implement the treaty.<sup>98</sup> The committee then makes concluding observations about the party's progress and makes recommendations about what steps need to be taken to be to further compliance.<sup>99</sup> Since, as mentioned above, the U.S. has not ratified either treaty, it does not have to submit reports nor are recommendations and observations about its compliance given. In addition to these concluding observations, the Committee also issues general comments about a particular provision.<sup>100</sup> These general comments provide the Committee's interpretation of the various provisions set forth in the convention.<sup>101</sup>

By using the general comments, this paper will try to alleviate the ambiguities created by Article 4 and Article 28 so as to determine more concise obligations for states. The Committee has not produced general comments for the sections of Article 28. However, there are several concluding observations that could provide useful to interpret the responsibilities under Article 28. According to the general comment to Article 4, numerous obligations are implied in its terms and in some circumstances, these burdens are onerous. Each State party is reminded that it has the obligation to fulfill the mandate of the Children's Convention even if it delegates its responsibilities to lower governments, private organizations, or non-profit organizations.<sup>102</sup> All sectors of society must be engaged and the views of children themselves should be given high priority and should be assessed regularly.<sup>103</sup> Children are best able to determine if their rights are being realized and protected.<sup>104</sup> Government should be opened extensively for input by children and new measures should be taken based on these suggestions.<sup>105</sup> The Committee goes as far as to recommend that the development of a new division in each department designated solely to address children's rights would be necessary to fulfill a parties' obligations under the

convention.<sup>106</sup> This could be a very daunting task imposing a very substantial and time-consuming burden on State parties. State parties are obligated to provide to the maximum extent of their resources the widest possible enjoyment of the Convention's provisions.<sup>107</sup> The most disadvantaged groups are to be given priority yet discrimination is not allowed under any circumstances.<sup>108</sup> The obligations under this Convention are not to be seen as charitable to any one particular group.<sup>109</sup>

The Committee has determined that all obligations must be implemented with respect to the general measures outlined in its comment. In order to determine what this means in practical terms, the concluding observations and recommendations given to parties under Article 28 will be useful. Legislation can be implemented as a means to ensure these rights.<sup>110</sup> In Argentina, the Committee recommended that the country enforce its Social Plan of Education legislation to ensure regular attendance at school and reduce drop-out rates, especially for the most disadvantaged children.<sup>111</sup> In Georgia, the Committee commended the adoption of the 1997 Education Act, which had the view of improving the situation of education in the State party.<sup>112</sup> The Committee welcomed legislation in Italy that extended the duration of compulsory education from 8 to 10 years.<sup>113</sup> In Burkino Faso, the Committee appreciated the country's adoption of the 1996 Education Act which increased the budget for education.<sup>114</sup> In Cameroon, the Committee recommended urgent implementation of the Finance Act which would make primary education free to all and provide assistance for the poor to attend school.<sup>115</sup> In all of these cases, legislation helped to further the right to education in these respective countries.

Coordinating and monitoring bodies should be set up to collect data to alleviate discrimination and disparities, raise awareness of child and parents rights under the

Convention, develop appropriate programs, and assess budgetary needs of programs.<sup>116</sup>

Parties are obligated to analyze groups that may have special needs, apply best standards in implementing new procedures, and liberally interpret development of these provisions.<sup>117</sup>

This obligation includes independent budgets for its implementation, reporting progress on a national level, and specially training individuals to further the Article's interests.<sup>118</sup>

The obligations raised in the above paragraph seem to be the most troubling areas for State parties especially in terms of reduction of drop-out rates and regular school attendance.<sup>119</sup> An increased budget to improve the quality of education and to reduce the drop-out rate and ensure regular attendance was recommended to the country of Argentina.<sup>120</sup> The Committee recommended to the country of Belize that it needs to make its citizens more generally aware of their rights under Article 28, especially the more disadvantaged classes.<sup>121</sup> Additionally, the Committee was concerned that the high drop-out rate, the goals and infrastructure of education as a whole, and the economically disadvantaged were not being addressed.<sup>122</sup> To alleviate these problems, the Committee recommends the use of media to create awareness of rights, a reinforcement of adequate training and facilities, and more attention be focused on reducing economic disparity.<sup>123</sup> In Burkino Faso, the Committee mandated the government to determine the causes for high drop-out rates and take all necessary measures to make primary education completely free and then help children attend secondary school.<sup>124</sup> China must focus on reviewing the disparities in the urban-rural areas to address the possible re-allocation of resources.<sup>125</sup> In Georgia, the Committee urged the country to increase its level of public expenditure on education and to collect disaggregated data on drop-out rates and expulsions.<sup>126</sup> The Committee's main concern is with localization of funds in households leading to the decline of public funds.<sup>127</sup> In the United Kingdom, the

Committee recommended that more respect and weight needed to be given to the views of the child concerning education.<sup>128</sup> Inequalities in educational achievement must be eliminated and the impact of privatization of schools must be evaluated by the UK government.<sup>129</sup>

Furthermore, the Committee recommends adopting other international human rights treaties and making the Convention a part of domestic law as furthering general measures of implementation.<sup>130</sup> For instance, in Canada, the Committee recommended the ratification of the United Nations Educational, Scientific and Cultural Organization Convention against Discrimination in Education of 1960 to promote national support to eliminate discrimination of Aboriginals.<sup>131</sup> As part of the domestic law, the right to a cause of action under the provisions should be real and remedies should be genuine.<sup>132</sup> The citizens should be able to sue under the terms of the Convention if their right to education is being deprived.<sup>133</sup> All in all the Committee obligates parties to show an actual cross-sectoral makeover to implement the provisions of Article 28 with the national government at the helm.<sup>134</sup>

The Convention also places a burden on the States parties on an international level.<sup>135</sup> Each party must promote and assist fellow parties to the fullest extent possible.<sup>136</sup> This means wealthy, more industrialized countries must attend to the guarantees of the right to education in its own country and provide monetary and technical support to other parties as necessary or able.<sup>137</sup>

#### *International Covenant on Economic, Social and Cultural Rights (ICESCR)*

In 1976, the International Covenant on Economic, Social and Cultural Rights was put into force.<sup>138</sup> Over three-quarters of UN member states are parties to this convention.<sup>139</sup> “The Covenant guarantees economic, social and cultural rights [and] outlines the legal

obligations of states parties under this Covenant.”<sup>140</sup> Included in these socioeconomic rights is the positive right to education.<sup>141</sup>

Under Article 13, the Covenant states, “States parties. . . recognize the right to everyone to education.”<sup>142</sup> Additionally, as in the Children’s Convention, the Covenant outlines several conditions that must be achieved.

“States parties . . . recognize. . . : 1) Primary education shall be compulsory and available free to all; 2) Secondary education. . . shall be made generally available and accessible to all by every appropriate means. . . 4) Higher education shall be made equally accessible to all. . . and in particular by the progressive introduction of free education; 5) free Fundamental education shall be encouraged or intensified. . . for those people who have not received or completed the whole of their primary education; 6) The development of a system of schools at all levels shall be actively pursued.”<sup>143</sup>

The Covenant also attempts to guide States Parties in implementing its mandate. Article 2 states that

“Each state party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”<sup>144</sup>

This Covenant does not require immediate implementation but instead requires a more progressive approach to its implementation.<sup>145</sup>

Similar to the Children’s Convention, “the Committee on Economic, Social and Cultural Rights (CESCR) is the body of independent experts that monitors implementation of the

International Covenant on Economic, Social and Cultural Rights by its States parties.”<sup>146</sup>

The process of monitoring countries under the Covenant is consistent with the process under the Children’s Convention.<sup>147</sup> CESCR develops its own general comments and concluding observations to provide guidance to the Covenant parties.<sup>148</sup>

Using the general comments and concluding observations of Article 13 and Article 2, this paper will attempt to alleviate the ambiguities of those provisions of the Covenant. Since Article 2 explains the extent to which the obligations of Article 13 must be fulfilled, the analysis will begin with an examination of Article 2. Article 2 creates obligations of both conduct and of result.<sup>149</sup> Each state party must take steps towards realizing these obligations that are “deliberate, concrete and targeted” within a reasonably short period of time after the Covenant goes into force.<sup>150</sup> Due to the nature of these rights, the Committee understands that immediate full realization is not always possible but the Committee requires expeditious and effective measures to be taken.<sup>151</sup> This will most often be accomplished through legislation but adoption of legislation is by no means exhaustive of the responsibilities.<sup>152</sup> Financial, administrative, social, and educational measures are other suggestions made by the Committee.<sup>153</sup> Although, no matter what measure is taken, the state must ensure that the parties trying to enforce these rights have a cause of action under the law.<sup>154</sup> Each party undertakes these obligations to the widest enjoyment possible by its citizenry.<sup>155</sup> Finally, each party is committed to using international cooperation and assistance in achieving these obligations.<sup>156</sup>

With clarification of Article 2, Article 13 obligations can be discussed and defined with more precision for parties. Article 13 happens to be the longest provision in the Covenant and the most comprehensive article on the right to education.<sup>157</sup> “States parties have immediate

obligations, in respect to the right to education, to guarantee that the right will be exercised without discrimination of any kind and the obligation to take steps towards full realization of Article 13.”<sup>158</sup> Although Article 2 understands that full realization of the Covenant will not take place immediately, it does require the highest priority be given to primary education which should be free and compulsory.<sup>159</sup> “Progressive realization of education” should begin with free, compulsory primary education taking concrete steps towards free secondary and higher education.<sup>160</sup> Secondary education must be made generally available, disregarding actual capacity and shall be distributed on the same basis to all.<sup>161</sup> To have the widest possible enjoyment by the citizenry and by all appropriate means, secondary education “should adopt varied and innovative approaches to its delivery.”<sup>162</sup> Steps must also be taken towards achieving free secondary education.<sup>163</sup> “Higher education, [on the other hand,] shall be made accessible to all, on the basis of capacity.”<sup>164</sup> This means that higher education shall gradually through targeted measures be made free but can be based on the capacity of the individual to attain it.<sup>165</sup> To achieve these measures, an “overall development strategy” should be “actively pursued” with a high degree of governmental priority and with vigor which include benchmarks and indicators to monitor progress.<sup>166</sup> At the very least, parties must establish “minimum educational standards” that all institutions must follow.<sup>167</sup> In addition, discrimination must be completely eradicated without progressive realization or availability of resources.<sup>168</sup> Elimination of discrimination of all forms, including racial/ethnic, geographical, and economic, must be fully and immediately realized at all levels of education.<sup>169</sup> No retrogressive measures can be taken because it would violate Article 2’s requirement to fulfillment to the party’s maximum available resources and with widest possible enjoyment.<sup>170</sup>

The expectations under Article 13 of the Covenant have been articulated. The concluding observations will provide a valuable practical interpretation of these treaty provisions. It is apparent in its concluding observations that the Committee has been very dedicated to realization of these goals in a progressive manner and on the basis of available resources of the particular nation state. For example, with respect to the positive right of education, in China, the Committee called upon the state to make sure that all children gain “access to free compulsory education” on a non-discriminatory basis.<sup>171</sup> It asked the party to discontinue school related fees, to allocate sufficient funds to support free, compulsory education in general, and to deliberately target rural groups where drop out rates are higher.<sup>172</sup> The Committee welcomes the adoption of legislation that will develop and reform the current status of education in China.<sup>173</sup> However, the Committee did not unrealistically expect or command that China provide these measures immediately but gave the country several years to implement these recommendations and re-allocate its funds.<sup>174</sup> The same is true in states such as Kuwait where primary education is not yet compulsory and free.<sup>175</sup> The Committee recommends that Kuwait immediately develop a plan of action for primary education and set goals for its achievement.<sup>176</sup> On the other hand, in Canada, the Committee required more of Canada because Canada has more available resources to devote to the right to education. The Committee recommended that the party should make higher education accessible by every appropriate means, on the basis of capacity.<sup>177</sup> The Committee called for the equal treatment of African Canadians in the educational sector with targeted programs of action to ensure this right.<sup>178</sup> These observations confirm that the Committee does prioritize compulsory education and expects different levels of compliance depending on a state party’s economic



and political status. In addition, the Committee firmly requires the eradication of discrimination immediately as evidenced by the Canadian observation.

The Committee also stipulated for budgetary changes. Regarding Mexico, the Committee told the state to increase its educational budget to strengthen and upgrade schools for indigenous peoples and other disadvantaged groups and also for intercultural education.<sup>179</sup> Regarding Chile, the Committee recommended that the economic disparity between schools in municipal areas and private schools should be rectified by budgetary changes.<sup>180</sup> These concluding observations are great resources when countries are trying to determine whether wealth and other resources have been adequately appropriated to the particular human right.

In the international community, education is seen as a basic necessity to the human race. Since the adoption of the Universal Declaration of Human Rights, the international community has strived to set standards regarding human rights. As seen in the Convention on the Rights of the Child and the International Covenant on Economic, Social and Cultural Rights, education is a priority and fundamental right to all mankind. The monitoring committees set up for these conventions have provided goals to strive towards so that the international establishment of human rights standards will be realized.

### **III. Is U.S. education law in compliance with international standards?**

The right to education has evolved uniquely different in the United States than in the international sector. As was mentioned, the Supreme Court has declined to recognize the fundamental positive right to education. In addition, the U.S. has refused to ratify the Convention on the Rights of the Child and the International Covenant on Economic, Social, and Cultural Rights. Even so, it should be explored whether the U.S. is in compliance with

international standards, what strides could possibly be taken to come into compliance, and what that means in terms of economic and political changes.

At first glance, the U.S. would appear to be complying with international standards based on the free, compulsory primary education that every state in the Union provides for within their constitutions or statutes. The tradition of free public education in the U.S. even predates the emergence of the human rights movement itself.<sup>181</sup> In addition, secondary education is compulsory to at least the age of 16 and free to citizens in the U.S.<sup>182</sup> Vocational and technical education is part of the secondary educational level curricula along with college preparatory education.<sup>183</sup> This achieves the main goals of both conventions to make primary education free and compulsory and of the highest priority.<sup>184</sup> In addition, secondary education has been varied and available on a free basis to all generally without regard to capacity as required under the Children's Convention and the ICESCR.<sup>185</sup> Furthermore, under federal statute, handicapped or disabled persons are guaranteed a positive right to education. Under the Children's Convention and the ICESCR, groups with special needs must be provided opportunities to education.<sup>186</sup> The federal statute makes guarantees and special accommodations so as to provide an affirmative obligation to the disabled of a positive right to education.<sup>187</sup> It also holds the federal government responsible to provide this right.<sup>188</sup>

Besides these positive aspects, according to the international standards enumerated above, the U.S. appears to be in non-compliance in several important ways. The key reasons for this are discrimination and economic disparity.<sup>189</sup> Underlying these issues is the U.S. attitude of exceptionalism.<sup>190</sup> The idea that the U.S. does not have to abide by human rights laws because of its stature but can hypocritically tell other countries to abide by the rules.<sup>191</sup>

This exceptionalism facilitates the attitude that the U.S. system is better than the international standards and that compliance is unnecessary.<sup>192</sup>

Discrimination is of immediate and vital importance in the Children's Convention and the ICESCR. In each convention, the eradication of discrimination cannot be achieved progressively but it must be done so immediately before compliance with the other provisions can be met.<sup>193</sup> Since *Brown*, the U.S. has stated its commitment to equal opportunity education and has condemned *de jure* racial segregation in public schools. However, in practice, this segregation still exists because priority within public schools has shifted its concern from racial and ethnic discrimination to academic accomplishments.<sup>194</sup> Therefore, in public schools more emphasis is placed on what children are learning and to what extent rather than if children are getting the same education, in terms of quality and quantum, throughout the U.S.<sup>195</sup> In essence, pre-Brown claims of inadequate funding and inadequate quality of education based on racial and ethnic divides are resurfacing.<sup>196</sup>

Schools are still rampant with segregation and inequality.<sup>197</sup> Inferior education continually afflicts minorities in the U.S., especially in the south.<sup>198</sup> Historical remnants of the old south continually foster the ideals of inferiority and devaluation along racial lines.<sup>199</sup> Many minorities are subjected to overcrowded classrooms, dilapidated schools, no textbooks or out-dated books, overburdened teachers, unqualified teachers, and disinterested administrators.<sup>200</sup> Access to educational opportunities becomes limited based on race.<sup>201</sup> The federal government has not effectively developed a national plan that would eradicate discrimination immediately nor make education to all more accessible as required under the Children's Convention and the ICESCR.<sup>202</sup>

In conjunction with racial/ethnic discrimination is economic disparity. Economic disparity adds to the hindrance of educational development in poverty stricken areas which are composed of mainly racial minorities. In many respects, economic inequality is the main reason for the vast differences in educational quality and access due to its nature of distribution.<sup>203</sup> As mentioned above, education is relegated to the states. This makes funding for education discretionary and non-uniform.<sup>204</sup> The funding structure of the education scheme in the U.S. is localized and varies immensely between urban, rural and suburban areas.<sup>205</sup> The local school districts develop their own priorities and set their own property taxes that pay for education.<sup>206</sup> Proportionally to local funding, state and federal governments appear to provide little money to school districts. Therefore, the largest educational budgets are found in rich school districts and the poorest districts have the smallest budgets.<sup>207</sup> Budgets are allocated based on political decision-making and have a political agenda behind their allocation instead of being allocated based on equality and need.<sup>208</sup> Since most economically depressed areas correlate to racial minorities, most racial minorities are deprived of equal and desegregated schools.<sup>209</sup> This economic disparity continues to contribute to discrimination. Because of this distribution scheme, the responsibility to provide a right to education does not rest with the national government which is required under the conventions.<sup>210</sup> It does not give the U.S. citizens the ability to have a cause of action under the federal law if their right to education is being hindered and doesn't make the national government accountable for not providing uniform education. By continuing this type of economic distribution, the U.S. is not working to achieve uniformity in educational goals or the access to such education economically capable by all. Therefore,

it cannot be in compliance with the international conventions. Since discrimination is so closely linked with economic inequality, it is unable to traverse this problem also.

In addition, the U.S. cannot begin to address concerns of higher education, including attainment by all who have the capacity to do so, with its current status of economic and racial discrimination. These problems would need to be addressed first before the U.S. could concentrate on making higher education free to all, on the basis of capacity. The U.S. cannot be in compliance with international human rights conventions if it will not aptly and immediately address the issue of racial discrimination in its primary and secondary schools nor its apparent economic disparity.

A central challenge to this goal is the lack of representation of children. Under the Children's Convention, it is quite evident that the international community requires that children have a voice in their education.<sup>211</sup> In fact, the Children's Convention includes a provision that speaks directly to inclusion of the children's voice.<sup>212</sup> However, in the U.S., "children have no recognized right to articulate and defend their own vision of what their education should be."<sup>213</sup> Since the Supreme Court has only recognized the Constitutional Due Process right of the parent to control their child's education, only the parent has control through litigation or voting to change the direction of the child's education.<sup>214</sup> Children are therefore denied their right to be subjects of that right and are denied any valid exercise of the right to education.<sup>215</sup> "All children suffer the consequences of their lack of political voice."<sup>216</sup>

Even though the U.S. would like to believe it is the purveyor of human rights, it does not even guarantee nor fully comply with the goals expounded by the international human rights standards on the right to education. How would current U.S. law have to change to comply

with these conventions? Would the ratification of these conventions substantially change the way the U.S. handles education law?

At this time, education is an option the state government need not provide. There are no mandatory funding amounts required by the federal or state governments. The federal government has not recognized a positive fundamental right to education. Discrimination, economic disparity, and educational inequality are still prominent in U.S. education. Politics govern who gets the money and who accomplishes the most learning. What could be done to change this?

Federal action needs to be taken. Some believe it would only require the recognition of a positive fundamental right to education under the Constitution while others believe that a constitutional amendment is necessary. Seemingly, according to international legal standards, any degree of recognition of a positive fundamental right would be a step in the right direction because of the benefits it would bring to education. Under the current regime, the federal government is seen as devoid of the power to act and complacent in the realm of education.<sup>217</sup> States lack the financial capacity and political cohesion to completely fulfill their obligations to provide education equally to all of their citizens.<sup>218</sup> If the federal government were to recognize a positive right to education it would be obligated to work with states to ensure education to all.<sup>219</sup> “The federal government could bring. . . the financial resources, the visible leadership, the coordinating capacity, and the focus on national interest.”<sup>220</sup> Developing a constitutional positive right to education would re-enforce its importance in our society and elevate its respect nationwide.<sup>221</sup>

In the marginal debates, some believe that only a constitutional amendment could achieve the goals of international human rights standards. This amendment would “place the [U.S.]

in the company of nearly every industrialized nation.”<sup>222</sup> It would give the U.S. the legitimacy to advocate freedom and democracy worldwide that the right to education coincides with.<sup>223</sup> Such an amendment would force the Supreme Court to face the educational history of race and wealth distinctions.<sup>224</sup> There would be no more so called passing the buck. The Supreme Court and the federal government could no longer hide behind the actions of the states. In reality, the U.S., if it were to ratify the Children’s Convention and ICESCR, it would be unable to hide behind the Constitution anyway. The conventions give ultimate responsibility to the State parties no matter if they delegate the power to other organizations either public or private to ensure the rights under it.<sup>225</sup> In addition, the amendment would re-enforce the importance of education in our democratic society and elevate its respect.<sup>226</sup> It would “undo the damage from the widespread denial of equal educational opportunity that has resulted from [Supreme Court] decisions.”<sup>227</sup> In doing so, national attention will turn to the failing state of our educational system and work towards fixing it.<sup>228</sup>

Either way the U.S. decides to handle the right, it will vastly change the way the U.S. manages education. Since federalization of the right might be the only viable option to come into compliance with international human rights standards, the federal government would be faced with shifting financial resources and political backlash from more wealthy and supportive lobbying groups or states.<sup>229</sup> The U.S. educational history is so grounded in localization and state control over education it would be difficult to create uniformity of the education process without vast shifts in power.

The most glaring problem will be the financial redistribution.<sup>230</sup> As mentioned in the opening paragraph to this paper, the U.S. is the wealthiest country in the world. It has the

resources to provide the federal positive right to education but it does not have the prioritization that such a task would require. Ratifying the conventions would take the U.S. out of the signatory bracket where respect for the object and purpose of the mission needs to be given and place it into the obligation bracket where it would have to fulfill the mandates in the conventions and the recommendations of the Committee. Without alleviating the highly visible racial discrimination and the apparent economic disparity, the U.S. would never pass muster under the Committee guidelines. Funding would need to be re-allocated so that more equal distribution occurred. It would be unacceptable to continue the current structure of local taxes because it would continually feed the inequality in the educational system.<sup>231</sup> The Supreme Court and the federal government would have to find themselves taxing on a national level to fund the right to education. Congress could no longer condition funds and make allocations on a discretionary basis.<sup>232</sup> The political branches would have to allocate funds in the budget for education and debates would shift regarding funding to how to make allocation equal among the districts based on an affirmative right to education.<sup>233</sup>

Affirmative steps to end discrimination would also need to be taken. This might even require the recognition by the Supreme Court of a suspect class under economic disparity which it would not be ready for. According to *Kadrmas v. Dickinson Public Schools* and *Papasan v. Allain*, the Supreme Court has refused to recognize a higher level of scrutiny than rational basis for claims of economic disparity.<sup>234</sup> The Supreme Court declined to recognize wealth as a suspect class and therefore, most cases are upheld in light of apparent economic disparity.<sup>235</sup> However, with a reorganization of the public funds and the guaranteed right to education, more people would be able to exercise and demand equality. This financial redistribution would eliminate some of the race and wealth issues prevalent in our



educational system. Educational funding would be equal. In doing so, each child in U.S. public schools would be obtaining the same opportunities to acquire learning instead of the opportunities the local taxes could provide.

The U.S. would need to give a voice to the children. Under the conventions, it is important the person who owns the right be able to exercise that right especially under the Children's Convention. The federal government would have to work out a system where children were given an opportunity to give their input and their needs were actually taken into consideration. Since parents are given the Constitutional right to direct the upbringing of their children, this might be difficult to enforce in the U.S. It would require the Supreme Court to recognize a constitutional right for children to rear their own education. It would also hinder the right of the parent under the Constitution to be able to rear their child's upbringing. Therefore, giving more voice to children could create this conflict of interest that would result in a violation of the Constitution. A possible avenue to rectify this problem would be to set up a special unit in each governmental department that would be completely dedicated to children's concerns.<sup>236</sup>

In reality, ratification of the conventions by the U.S. would dramatically change the political landscape of education. The state governments would most likely have to relinquish a lot of control to the federal government whom would have to redistribute wealth, tax nationally, and eliminate discrimination since it would be the federal government's responsibility to implement the conventions. Furthermore, the federal government would have to consider making wealth a suspect or quasi-suspect class and allow children to have a voice in the educational process and its rearing. The perception of who is responsible for education and who pays for education would have to be altered and a new found respect for

education declared. Additionally, under the conventions, the U.S. would be obligated to provide international assistance and cooperation when necessary.<sup>237</sup> Due to the enormous economic resources available in the U.S., its financial support would be overwhelming necessary. This could further require the need for expansion in the federal budget and more of an international obligation that the politicians are unwilling to contribute to.

Realistically, the Committees would have a hard time enforcing the U.S.'s compliance with the provisions of the conventions. That appears to be the eternal problem in international human rights law. The United Nations works diligently to ensure that States parties fully comply with the conventions and fulfill their mandates. However, the United Nations has no real enforcement mechanism in place to guarantee compliance of these conventions. Of course, reporting requirements exist that would require the U.S. to report on its compliance. In so doing, it would face the embarrassment and criticism of the current status of the right to education by the international community but would this be enough to make the U.S. comply with international human rights standards. This is unknown.

#### **IV. Conclusion**

The right to education in the U.S. has a long and varied history. It has always been a localized practice provided by the states and local authorities without formal recognition of a federal fundamental positive right to education. However, in an ever smaller world, the necessity to be a true democratic leader grows. Central to a true democratic government is the availability and right to education for its citizens. Without ratification of the Convention on the Rights of the Child and the International Covenant on Economic, Social and Cultural Rights, the U.S. continues to exude hypocrisy for its efforts worldwide, spouting its superior democracy but not practicing it, specifically in regard to a positive right to education.

This paper specifically focused on the status of the right to education. With the U.S. political landscape, a federal positive right to education would create vast changes in the economic structure. It would also require the federal government to deal with racism and an inadequate voice for children which will present difficulties for the courts and legislature.

Even though the Committees used to enforce the conventions would have no real enforcement power over the U.S., it would still be subject to even more criticism and embarrassment than it is currently. Under the current structure, the U.S. hides behind its Constitution and creates illusory statements of upholding human rights. To bring the U.S. in compliance with international human rights standards on education, the federal government would need to be willing to affirmatively recognize the right to education and prioritize its vast resources in different ways. It would also have to make a firm commitment to the international community to assist and continue to further the right to education internationally.

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<sup>1</sup> Natsu Taylor Saito, *Symposium: Is United States Constitutionalism Good or Bad for International Human Rights?: Returning to First Principles: International Human Rights as U.S. Constitutionalism*, 1 FIU L. Rev. 45, 55 (2006).

<sup>2</sup> Peter Smith, *Notes and Comments: Addressing the Plight of Inner-City Schools: The Federal Right to Education After Kadrmas v. Dickinson Public Schools*, 18 Whittier L. Rev. 825, 843 (1997).

<sup>3</sup> Brooke Wilkins, *Should Public Education be a Federal Fundamental Right?*, 2005 BYU Educ. & L.J. 261, 271 (2005).

<sup>4</sup> *Id.*

<sup>5</sup> *Meyer v. Nebraska*, 262 U.S. 390 (1923).

<sup>6</sup> Susan H. Bitensky, *Legal Theory: Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 Nw. U. L. Rev. 550, 563 (1992)[hereinafter Bitensky]; Kara A. Millonzi, *Education as a Right of National Citizenship Under the Privileges or Immunities Clause of the Fourteenth Amendment*, 81 N.C. L. Rev. 1286, 1309-10(2003).

<sup>7</sup> *Id.*

<sup>8</sup> *Meyer*, 262 U.S. at 390.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Bitensky, *supra* note 6, at 564.

<sup>12</sup> Smith, *supra* note 2, at 836.

<sup>13</sup> Wilkins, *supra* note 3, at 273-274.

<sup>14</sup> *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

<sup>15</sup> William Campbell, Jr., *Moving Against the Tide: An Analysis of Home School Regulation in Alabama*, 52 Ala. L. Rev. 649, 653 (2001).

<sup>16</sup> *Id.*

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<sup>17</sup> *Id.* at 654.

<sup>18</sup> Susan H. Bitensky, *We “Had a Dream” in Brown v. Board of Education*, Mich. St. L. Rev. (1996)[hereinafter Susan H. Bitensky].

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 493.

<sup>21</sup> Millonzi, *supra* note 6, at 1286.

<sup>22</sup> Smith, *supra* note 2, at 836.

<sup>23</sup> *Id.*; Bitensky, *supra* note 6, at 565; James A. Gross, *A Human Rights Perspective on U.S. Education: Only Some Children Matter*, 50 Cath. U.L. Rev. 919, 923 (2001).

<sup>24</sup> Bitensky, *supra* note 23.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *San Antonio Independent v. Rodriguez*, 411 U.S. 1 (1973).

<sup>28</sup> *Id.*

<sup>29</sup> Bitensky, *supra* note 23; Gross, *supra* note 23.

<sup>30</sup> *Rodriguez*, 411 U.S. at 1.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> John Dayton & Anne Dupre, *School Funding Litigation: Who’s Winning the War?*, 57 Vand. L. Rev. 2351, 2366-67 (2004); *Plyler v. Doe*, 457 U.S. 202 (1982).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Bitensky, *supra* note 6, at 568.

<sup>37</sup> Dayton & Dupre, *supra* note 33.

<sup>38</sup> *Papasan v. Allain*, 478 U.S. 265 (1986).

<sup>39</sup> *Id.*

<sup>40</sup> Smith, *supra* note 2, at 841.

<sup>41</sup> Bitensky, *supra* note 6, at 569.

<sup>42</sup> *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 2342.

<sup>46</sup> *Id.*

<sup>47</sup> *See, generally*, above cases.

<sup>48</sup> *Id.*

<sup>49</sup> THE EDUCATIONAL RIGHTS OF STUDENTS: INTERNATIONAL PERSPECTIVES ON DEMYSTIFYING THE LEGAL ISSUES 223-43 (Charles J. Russo et al. eds., Rowman & Littlefield Education) (2007) [hereinafter Educational Rights].

<sup>50</sup> Wilkins, *supra* note 3.

<sup>51</sup> Educational Rights, *supra* note 49, at 236.

<sup>52</sup> *Id.* at 235.

<sup>53</sup> *Id.* at 236.

<sup>54</sup> *Id.* at 238.

<sup>55</sup> *Id.*

<sup>56</sup> Trisha Loscalzo Yates, *A Criticism of the No Child Left Behind Act: How the Convention on the Rights of the Child Can Offer Promising Reform of Education Legislation in America*, 5 Whittier J. Child & Fam. Advoc. 399 (2006).

<sup>57</sup> Amy Reichbach, *Note: The Power Behind the Promise: Enforcing No Child Left Behind to Improve Education*, 45 B.C. L. Rev. 667 (2004).

<sup>58</sup> Yates, *supra* note 56, at 400.

<sup>59</sup> Jeffrey Croasdel, *State Constitutional Protection of Children with Aids and the Right to a Public Education*, 42 Clev. St. L. Rev. 239, 254 (1994).

<sup>60</sup> Wilkins, *supra* note 3, at 285.

<sup>61</sup> *Id.* at 287.

<sup>62</sup> *Id.*

<sup>63</sup> Susan H. Bitensky, *supra* note 18.

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<sup>64</sup> Wilkins, *supra* note 60.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> Millonzi, *supra* note 6, at 1288.

<sup>68</sup> Educational Rights, *supra* note 49, at 225.

<sup>69</sup> *Id.*; Bitensky, *supra* note 6, at 587.

<sup>70</sup> International Covenant on Economic, Social, & Cultural Rights – Ratification Signatures, <http://www.ohchr.org/english/countries/ratification/3.htm>; Convention on the Rights of the Child- Ratification Signatures, <http://www.ohchr.org/english/countries/ratification/11.htm>; Convention on the Rights of the Child, G.A. Res. 44/25 (Nov. 20, 1989) [hereinafter Children’s Convention]; International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), (Dec. 16, 1966) [hereinafter ICESCR].

<sup>71</sup> Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 6.

<sup>74</sup> *Id.*

<sup>75</sup> Children’s Convention, *supra* note 70.

<sup>76</sup> *Id.*

<sup>77</sup> Vienna Convention, *supra* note 71, at 8.

<sup>78</sup> Saito, *supra* note 1, at 53.

<sup>79</sup> Restatement (Third) of the Foreign Relations Law of the U.S. § 103 (1987).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 10, 1948).

<sup>83</sup> *Id.*

<sup>84</sup> A.H. Robertson & J.G. Merrills, HUMAN RIGHTS IN THE WORLD: AN INTRODUCTION TO THE STUDY OF THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS 28 (Manchester University Press, 4<sup>th</sup> ed. 1996) (1972).

<sup>85</sup> *Id.* at 29.

<sup>86</sup> *Id.*

<sup>87</sup> Children’s Convention, *supra* note 70.

<sup>88</sup> Maria Grahn-Farley, *International Child Rights at Home & Abroad: A Symposium on the UN Convention on the Rights of the Child: Crossing Borders*, 30 Cap. U. L. Rev. 657 (2002).

<sup>89</sup> *Id.* at 658.

<sup>90</sup> ICESCR, *supra* note 70.

<sup>91</sup> *Id.* at 8.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 2.

<sup>96</sup> *Id.*

<sup>97</sup> Committee on the Rights of the Child, *Monitoring Children’s Rights*, <http://www.ohchr.org/english/bodies/crc/> (last visited March 28, 2007) [hereinafter Monitoring Committee].

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> U.N. Econ. & Soc. Council [ECOSOC], Committee on the Rights of the Child, *General Comment No. 3: General Measures of Implementation of the Convention on the Rights of the Child*, U.N. Doc. CRC/GC/2003/5 (Nov. 27, 2003) [hereinafter Committee on Children’s Convention].

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Cynthia Price Cohen, JURISPRUDENCE ON THE RIGHTS OF THE CHILD 2471-2676 (Transnational Publication 2005).

<sup>112</sup> *Id.* at 2526.

<sup>113</sup> *Id.* at 2553.

<sup>114</sup> *Id.* at 2489.

<sup>115</sup> *Id.* at 2494.

<sup>116</sup> Committee on Children's Convention, *supra* note 102.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *See, generally*, Cohen, *supra* note 111.

<sup>120</sup> *Id.* at 2472.

<sup>121</sup> *Id.* at 2482.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 2490.

<sup>125</sup> *Id.* at 2503.

<sup>126</sup> *Id.* at 2528.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 2662-2663.

<sup>129</sup> *Id.*

<sup>130</sup> Committee on Children's Convention, *supra* note 102.

<sup>131</sup> Cohen, *supra* note 111, at 2498.

<sup>132</sup> Committee on Children's Convention, *supra* note 102.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> ICESCR, *supra* note 70.

<sup>139</sup> Anne F. Bayefsky, HOW TO COMPLAIN TO THE UN HUMAN RIGHTS TREATY SYSTEM 29 (Kluwer Law International 2003).

<sup>140</sup> *Id.*

<sup>141</sup> Monitoring Committee, *supra* note 97.

<sup>142</sup> *Id.* at 4.

<sup>143</sup> *Id.* at 4-5.

<sup>144</sup> *Id.*

<sup>145</sup> Robertson & Merrills, *supra* note 84, at 276.

<sup>146</sup> Committee on Economic, Social and Cultural Rights, *Monitoring the economic, social and cultural rights*, <http://www.ohchr.org/english/bodies/cescr/index.htm> (last visited March 28, 2007).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> U.N. Econ. & Soc. Council [ECOSOC], Committee on Economic, Social, and Cultural Rights, *The Nature of States Parties Obligations 14/12/90*, U.N. Doc. E/1991/23 (5<sup>th</sup> Sess. 1990).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> U.N. Econ. & Soc. Council [ECOSOC], Committee on Economic, Social, and Cultural Rights, *The Right to Education*, art. 13, U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999) [hereinafter ECOSOC].

<sup>158</sup> *Id.*

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<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> U.N. Econ. & Soc. Council [ECOSOC], Committee on Economic, Social, and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: People's Republic of China (including Hong Kong and Macao)*, U.N. Doc. E/C.12/1/Add.107 (May 13, 2005).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> U.N. Econ. & Soc. Council [ECOSOC], Committee on Economic, Social, and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Kuwait 07/06/2004*, U.N. Doc. E/C.12/1/Add.98 (June 7, 2004).

<sup>176</sup> *Id.*

<sup>177</sup> U.N. Econ. & Soc. Council [ECOSOC], Committee on Economic, Social, and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, U.N. Doc. E/C.12/CAN/CO/5 (May 22, 2006).

<sup>178</sup> *Id.*

<sup>179</sup> U.N. Econ. & Soc. Council [ECOSOC], Committee on Economic, Social, and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Mexico*, U.N. Doc. E/C.12/MEX/CO/4 (June 9, 2006).

<sup>180</sup> U.N. Econ. & Soc. Council [ECOSOC], Committee on Economic, Social, and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Chile 26/11/2004*, U.N. Doc. E/C.12/1/Add.105 (Nov. 26, 2004).

<sup>181</sup> U.N. Econ. & Soc. Council [ECOSOC], Commission on Human Rights, *Economic, Social and Cultural Rights*, U.N. Doc. E/CN.4/2002/60/Add.1 (Jan. 17, 2002) (*prepared by* Katarina Tomasevski, Special Rapporteur on the right to education) [hereinafter Special Rapporteur].

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *See, generally, supra* note 70.

<sup>185</sup> *Id.*

<sup>186</sup> Children's Convention, *supra* note 70.

<sup>187</sup> Educational Rights, *supra* note 49.

<sup>188</sup> *Id.*

<sup>189</sup> Special Rapporteur, *supra* note 181, at 7.

<sup>190</sup> Saito, *supra* note 1, at 48; Philip Aka, *Analyzing U.S. Commitment to Socioeconomic Human Rights*, 39 Akron L. Rev. 417, 435 (2006).

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *See, generally, Children's Convention, supra* note 70; ICESCR, *supra* note 70.

<sup>194</sup> Special Rapporteur, *supra* note 181, at 16.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> Gross, *supra* note 23, at 937.

<sup>198</sup> *Id.* at 940.

<sup>199</sup> *Id.*

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<sup>200</sup> *Id.*; Eric Lerum et al., *Strengthening America's Foundation: Why Securing the Right to an Education at Home is Fundamental to the United States' Effort to Spread Democracy Abroad*, 12 Hum. Rts. Br. 13 (2005).

<sup>201</sup> *Id.*

<sup>202</sup> Special Rapporteur, *supra* note 181, at 3.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 13.

<sup>205</sup> Millonzi, *supra* note 6, at 1290.

<sup>206</sup> *Id.*

<sup>207</sup> Special Rapporteur, *supra* note 181, at 15.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 6-7.

<sup>211</sup> Children's Convention, *supra* note 70.

<sup>212</sup> *Id.*

<sup>213</sup> Special Rapporteur, *supra* note 181, at 19.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 19.

<sup>216</sup> *Id.*

<sup>217</sup> Bitensky, *supra* note 6, at 632.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> Lerum, *supra* note 200, at 15.

<sup>222</sup> *Id.* at 16.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *See, generally*, Committee on Children's Convention, *supra* note 102; ECOSOC, *supra* note 157.

<sup>226</sup> Lerum, *supra* note 200, at 15.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *See, generally*, Special Rapporteur, *supra* note 181.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Papasan*, 487 U.S. 450 at 458.

<sup>235</sup> *Id.*

<sup>236</sup> Committee on Children's Convention, *supra* note 102.

<sup>237</sup> *See, generally*, *supra* note 70.